

Message Text

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TO AMEMBASSY BONN IMMEDIATE

AMEMBASSY LONDON IMMEDIATE

AMEMBASSY PRETORIA IMMEDIATE

INFO AMCONSUL CAPE TOWN

AMCONSUL JOHANNESBURG

AMCONSUL DURBAN

USMISSION USUN NEW YORK

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E.O. 11652:N/A

TAGS:TBIO, SENV, EFIS, SF

SUBJECT: NAMIBIAN FUR SEALS

REFS: (A) STATE 73771 (B) STATE 87976 (C) CAPE TOWN 569

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(G) LONDON 12722

1. REFTELS, BEING REPEATED TO ACTION POSTS NOT ALREADY
IN RECEIPT OF THEM, CONCERN A CASE BEFORE THE COMMERCE

DEPT IN WHICH A SOUTH CAROLINA COMPANY (FOUKE) IS SEEKING A WAIVER OF RESTRICTIONS IMPOSED BY THE MARINE MAMMAL PROTECTION ACT ON THE IMPORT OF FURSKINS. FOUKE WANTS TO IMPORT BABY FUR SEAL SKINS FROM SOUTH AFRICA FOR PROCESSING. ONE OF THE CURRENT ISSUES IN THE CASE IS WHETHER FOUR ISLANDS OFF THE COAST OF SOUTH-WEST AFRICA (PART OF THE PENGUIN ISLAND GROUP) ARE WITHIN SOUTH AFRICAN OR NAMIBIAN (SOUTH-WEST AFRICAN, FORMER GERMAN PROTECTORATE) TERRITORY. (COMMERCE DEPT HAS DECLINED TO PERMIT IMPORTATION OF SKINS HARVESTED IN NAMIBIA, AS RESULT OF STATE DEPT ADVICE THAT THIS WOULD VIOLATE U.S. OBLIGATIONS REGARDING NAMIBIA BECAUSE OF EXTENSIVE CONTACTS WITH S. AFRICAN CONSERVATION AUTHORITIES CONCERNING

THESE NAMIBIAN RESOURCES WHICH WOULD BE REQUIRED UNDER U.S. LAW TO AUTHORIZE SUCH IMPORTS.) THE ISLANDS ARE HEAVILY POPULATED WITH SEALS, OF WHICH THE SOUTH AFRICAN GOVT HARVESTS SOME 7,000,000 ANNUALLY FOR EXPORT. DEPT HAS BEEN REQUESTED BY COMMERCE'S NATIONAL MARINE FISHERIES SERVICE FOR EXPEDITIOUS STATEMENT OF OFFICIAL DEPT VIEW ON TERRITORIAL STATUS OF THE ISLANDS. DEPT STATEMENT WILL BE CONSIDERED BY NMFS IN ITS DECISIONS ON TOTAL NUMBER OF SEALS FOUKE WILL BE ALLOWED TO IMPORT FROM SOUTH AFRICA, AND WHETHER ANY OF THOSE MAY BE OF PENGUIN ISLANDS ORIGIN. DEPT WISHES TO OBTAIN ALL AVAILABLE INFORMATION RELEVANT TO ISLANDS' STATUS BEFORE ADVISING NMFS, AND ACCORDING REQUESTS ACTION ADDRESSEES TO DELIVER NOTE, IN ACCORDANCE WITH SPECIFIC INSTRUCTIONS CONTAINED, RESPECTIVELY, IN PARAS. 3-5 BELOW, INCORPORATING LANGUAGE OF PARA 2 BELOW.

2. "IN AN ADMINISTRATIVE PROCEEDING BEFORE THE DEPARTMENT OF COMMERCE OF THE UNITED STATES, A QUESTION HAS BEEN PRESENTED AS TO THE TERRITORIAL STATUS OF LONG ISLAND, ALBATROSS ROCK, SINCLAIR ISLAND, AND HOLLANDSBIRD ISLAND, LYING OFF THE SOUTHWEST AFRICAN COAST ROUGHLY BETWEEN LUDERITZ AND ALEXANDER BAYS. OUR RESEARCH TO DATE
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INDICATES THE FOLLOWING PROVISIONAL CONCLUSIONS.

"THE UNITED KINGDOM CLAIMED POSSESSION OF THESE ISLANDS, PART OF A GROUP KNOWN AS THE PENGUIN ISLANDS, ON MAY 5, 1866, AND BY LETTERS PATENT OF FEBRUARY 27, 1867, APPOINTED THE GOVERNOR OF THE COLONY OF CAPE OF GOOD HOPE TO BE GOVERNOR OF THE ISLANDS (BRITISH AND FOREIGN STATE PAPERS, VOL. 67, P. 554). THESE LETTERS PATENT ALSO AUTHORIZED THE LEGISLATIVE COUNCIL AND HOUSE OF ASSEMBLY OF THE COLONY OF THE CAPE OF GOOD HOPE TO ANNEX THESE ISLANDS TO THE COLONY BY APPLYING TO THE GOVERNOR FOR THEIR TRANSFER. THE COLONY ANNEXED

THE ISLANDS BY THE CAPE PARLIAMENT ACT NO. 4 OF 1874, ASSENTED TO ON JULY 6, 1874, AND ENTITLED 'THE ICHABOE AND PENGUIN ISLANDS ACT, 1874' (BRITISH AND FOREIGN STATE PAPERS, VOL. 67, P. 557).

"IN AUGUST, 1884, GERMANY CLAIMED TO PLACE UNDER PROTECTION THE TERRITORY ON THE SOUTHWEST AFRICAN COAST BETWEEN THE ORANGE RIVER AND 26 DEGREES SOUTH LATITUDE, AND BETWEEN 26 DEGREES SOUTH LATITUDE AND CAPE FRIO (BRITISH AND FOREIGN STATE PAPERS, VOL. 75, P. 538). ACCORDING TO THE PROCLAMATION BY WHICH GERMANY ANNOUNCED

THE PROTECTORATE, THE PROTECTED TERRITORY INCLUDED THE ISLANDS ALONG THE COAST THAT BELONGED TO IT BY THE LAW OF NATIONS (BRITISH AND FOREIGN STATE PAPERS, VOL. 75, P. 546). NEVERTHELESS, ON SEPTEMBER 20, 1884, THE GERMAN CHARGE D'AFFAIRES AT LONDON INFORMED THE BRITISH FOREIGN OFFICE THAT THE ISLANDS, BELIEVED BY THE GERMANS TO NUMBER TEN, WHICH THE CAPE COLONY HAD ANNEXED IN 1874, WOULD NOT BE CONSIDERED AS WITHIN THE PROTECTORATE (BRITISH AND FOREIGN STATE PAPERS, VOL. 75, P. 549).

"DURING SEPTEMBER, 1884, THE BRITISH AND GERMAN GOVERNMENTS DISCUSSED ESTABLISHING A MIXED COMMISSION TO DEFINE THE RIGHTS OF BRITISH SUBJECTS IN THE TERRITORY GERMANY HAD PLACED UNDER PROTECTION (BRITISH AND FOREIGN STATE PAPERS, VOL. 75, P. 547). IN ACCEDING TO THE BRITISH PROPOSAL FOR SUCH A MIXED COMMISSION, THE GERMAN AMBASSADOR STATED IN A NOTE OF OCTOBER 8, LIMITED OFFICIAL USE LIMITED OFFICIAL USE

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1884, THAT, AMONG ITS OTHER DUTIES, THE COMMISSION SHOULD INVESTIGATE THE QUESTION OF WHICH ISLANDS OFF THE COAST OF THE PROTECTORATE SHOULD BE CONSIDERED BRITISH RATHER THAN PROTECTORATE TERRITORY. THE AMBASSADOR RECALLED HIS ORAL ASSURANCE OF SEPTEMBER 20 THAT GERMANY WOULD NOT DEEM THE PENGUIN ISLANDS WITHIN THE PROTECTORATE, THEN STATED: 'MORE RECENT INFORMATION, WHICH HAS REACHED THE GOVERNMENT OF THE UNDERSIGNED, HOWEVER, LEAVES IT DOUBTFUL WHETHER THE PREMISES ON WHICH THE STATEMENT MADE REPOSED WERE CORRECT, AND WHETHER THE FACTS, TITLE OF ACQUISITION ON WHICH THE BRITISH CLAIMS WERE FOUNDED, ARE TO BE DEEMED LEGALLY VALID. THE MIXED COMMISSION WILL ACCORDING TO THE VIEW OF HIS MAJESTY'S (THE GERMAN) GOVERNMENT, HAVE TO EXAMINE AND REPORT UPON THESE POINTS.' (BRITISH AND FOREIGN STATE PAPERS, VOL. 75, PP. 551-552).

"MESSRS. BIEBER, FOR GERMANY, AND SHEPARD, FOR THE UNITED KINGDOM, MET IN CAPE TOWN TO SETTLE THE CLAIMS. WHILE THEY APPARENTLY AGREED ON THE DISPOSITION OF

MOST OF THE CLAIMS, THE DEPARTMENT OF STATE HAS BEEN UNABLE TO LOCATE PUBLISHED RECORDS OF THEIR AGREEMENT OR OF THEIR GOVERNMENTS' ASSENT TO IT. THE CLAIMS WHICH THE CAPE TOWN COMMISSIONERS DID NOT SETTLE WERE REFERRED TO TWO OTHER COMMISSIONERS MEETING IN BERLIN IN 1886, WHO AGREED ON A PROTOCOL OF JULY 15, 1886, THAT WAS LATER RATIFIED BY THEIR GOVERNMENTS (BRITISH AND FOREIGN STATE PAPERS, VOL. 77, P. 1042). THE PROTOCOL OF JULY 15 DID NOT ADDRESS THE STATUS OF THE PENGUIN ISLANDS, ALTHOUGH ARTICLE 4 DISPOSED OF CLAIMS INVOLVING CERTAIN ISLANDS IN THEIR VICINITY.

"THERE EVIDENTLY WERE NO OTHER DISPUTES ABOUT THE TERRITORIAL STATUS OF THE PENGUIN ISLANDS BETWEEN 1886 AND THE CREATION IN 1920 OF THE LEAGUE OF NATIONS MANDATE OVER THE FORMER GERMAN PROTECTORATE. THE MANDATE INSTRUMENT ITSELF GIVES NO CLUE AS TO THE ISLANDS' STATUS, SAYING ONLY, IN ARTICLE 1, THAT 'THE TERRITORY OVER WHICH A MANDATE IS CONFERRED ... COMPRISES THE TERRITORY WHICH FORMERLY CONSTITUTED THE GERMAN PROTECTORATE OF SOUTH-WEST AFRICA.'

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"THIS EVIDENCE APPARENTLY INDICATES THAT THE PENGUIN ISLANDS WERE NEVER PART OF THE GERMAN PROTECTORATE OF SOUTH-WEST AFRICA, AND THUS WERE NOT INCLUDED IN THE MANDATED TERRITORY OF SOUTH-WEST AFRICA CREATED IN 1920. THERE ARE, HOWEVER, AMBIGUITIES IN THE PUBLISHED HISTORICAL RECORD, AND, BEFORE RENDERING A FORMAL OPINION TO THE DEPARTMENT OF COMMERCE, THE DEPARTMENT OF STATE WOULD APPRECIATE THE OPPORTUNITY TO CONSIDER ANY INFORMATION AVAILABLE TO (YOU) BEARING ON THE TERRITORIAL STATUS OF THE PENGUIN ISLANDS BETWEEN 1866 AND THE PRESENT. INFORMATION ON THE NEGOTIATIONS OF COMMISSIONERS BIEBER AND SHEPARD IN CAPE TOWN BETWEEN 1884 AND 1886 WOULD BE PARTICULARLY WELCOME.

"WHILE THE DEPARTMENT OF STATE IS SEEKING THIS INFORMATION FOR AN OPINION THAT WILL NECESSARILY BE PART OF A PUBLIC RECORD, THE DEPARTMENT WILL AT (YOUR) REQUEST HOLD IN CONFIDENCE THE SOURCE OF WHATEVER INFORMATION (YOU) MAKE AVAILABLE TO THE DEPARTMENT.

"DUE TO THE NATURE OF THE ADMINISTRATIVE PROCEEDING IN WHICH THE QUESTION HAS ARISEN, THE DEPARTMENT OF STATE MUST MAKE AN EARLY RESPONSE TO THE INQUIRY IT HAS RECEIVED FROM THE DEPARTMENT OF COMMERCE, AND ACCORDINGLY WILL HAVE TO MAKE ITS DECISION ON THE BASIS OF INFORMATION IN ITS POSSESSION ON SEPTEMBER 24, 1976."

3. FOR PRETORIA AND LONDON: PLS DELIVER PARA. 2 BY

DIPLOMATIC NOTE. WE REALIZE WE HAVE ASKED MUCH THE SAME QUESTION BEFORE, ALTHOUGH LESS FORMALLY. IF THE HOST GOVERNMENTS HAVE NOTHING TO ADD TO THE RESPONSES THEY HAVE ALREADY GIVEN, A SIMPLE RESPONSE TO THIS EFFECT WOULD BE SATISFACTORY. LONDON: AIR POUCHES DOCUMENTS HAVE NOT YET BEEN RECEIVED. PRETORIA: THIS NOTE IS ALSO TO INDICATE TO SAG, AT FOUKE CO.'S STRENUOUS INSTANCE, THAT USG IS NOT STALLING ON THIS QUESTION AND THAT OUR PRELIMINARY RESEARCH SEEMS TO INDICATE THAT THE ISLANDS ARE SOUTH AFRICAN ALTHOUGH WE

HAVE NOT YET REACHED A FINAL CONCLUSION. FOUKE CLAIMS LIMITED OFFICIAL USE
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THAT UNLESS SAG HAS THIS SORT OF ASSURANCE ALMOST IMMEDIATELY, IT WILL CUT OFF ALL SEAL HARVESTING FOR EXPORT TO U.S.

4. FOR BONN: PLS DELIVER PARA 2 IN A DIPLOMATIC NOTE. INFORM OFFICIAL TO WHOM DELIVERED OF AS MUCH OF BACKGROUND, DRAWN FROM THIS CABLE AND REFTELS, AS YOU THINK APPROPRIATE. BONN IS THE CAPITAL MOST LIKELY TO HAVE USEFUL INFORMATION ON 19TH CENTURY HISTORY OF THIS DISPUTE.

5. FOR USUN: INSTRUCTIONS TO BE SENT SEPTTEL. ROBINSON

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